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II. FINDINGS OF FACT

2.1 Appellant David Bloshenko was a Security Guard 1 and a permanent employee for Respondent Department of Social and Health Services (DSHS) at Eastern State Hospital (ESH). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 356 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on November 2, 2000.

2.2 Appellant was employed at ESH for approximately eleven years. He had no prior history of formal disciplinary actions. However, Appellant was counseled on numerous occasions regarding his unprofessional interactions with others.

2.3 Appellant was aware of institution and department policies and of his duty to abide by those policies. He attended New Employee Orientation in 1991, and he received training specific to Sexual Harassment and Awareness on May 31, 1990 and again on January 11, 1991. Appellant's performance evaluations indicated that his performance as a security guard was acceptable. However, his evaluations show that his supervisors had ongoing concerns about his ability to interact with others in a professional manner.

2.4 By letter dated September 20, 2000, Harold Wilson, Chief Executive Officer for ESH, notified Appellant of his dismissal, effective October 6, 2000, for neglect of duty, gross misconduct and willful violation of published employing agency or department of personnel rules or regulations. Mr. Wilson alleged that Appellant stroked a coworker's hair, hooked his finger inside her blouse, touched her chest/breast area, pulled her blouse away from her skin and said, "just a little friendly advice; you'd better not bend over."

1 2.5 Kim Wendt was a Security Guard at ESH. Appellant worked the swing shift and Ms. Wendt
2 worked the day shift. On Saturdays and Sundays, when Appellant came on shift, he and Ms. Wendt
3 would meet in the security office to "pass down" information. Appellant and Ms. Wendt had a
4 working relationship but were not friendly with each other. Appellant felt that he could not joke
5 with Ms. Wendt and she felt intimidated by Appellant. In addition, Ms. Wendt had raised concerns
6 with her supervisors about Appellant making gender related comments. Appellant had been
7 counseled regarding his interactions with Ms. Wendt.

8
9 2.6 On Tuesday, May 23, 2000, Appellant was working the swing shift and Ms. Wendt was
10 working an extra day shift. Appellant arrived for work and met with Ms. Wendt in the security
11 office to complete pass down between their shifts. The events that occurred during the pass down
12 are in dispute. However, Appellant admits that in reference to the blouse Ms. Wendt was wearing,
13 he made the comment, "just a little friendly advice; you'd better not bend over," and that he brushed
14 his hand against Ms. Wendt's hair.

15
16 2.7 The Board must carefully weigh the credibility of witnesses in determining what took place
17 between Appellant and Kim Wendt on May 23, 2000. In this case, where Appellant and Ms.
18 Wendt's versions of the events vary, it is especially important for the Board to consider all of the
19 evidence presented. After considering all of the evidence, we find that Ms. Wendt was a reliable,
20 credible witness. Therefore, we find that the following events occurred.

21
22 2.8 When Appellant entered the office on May 23, 2000, Ms. Wendt was standing behind the
23 desk leaning slightly forward. Appellant walked around her and placed his hand on the side of her
24 head and touched her hair. When Ms. Wendt pulled away from Appellant's touch, he hooked his
25 finger inside the neckline of her blouse, pulled it away from her skin, and tugged twice while
26 making the comment that she should not bend over.

1
2 2.9 Ms. Wendt was shocked by Appellant's actions and made no comment to him at the time.
3 When they completed the pass down report, Ms. Wendt went directly to her supervisor's office to
4 report the incident.

5
6 2.10 Chuck Day was the supervisor for security staff. When Ms. Wendt arrived in his office, she
7 was visibly upset. Ms. Wendt asked Mr. Day if her blouse was all right or if it was too revealing.
8 Mr. Day told her it was fine. She then told him what had occurred with Appellant. Mr. Day called
9 Appellant into his office and he asked Appellant what had occurred. Appellant admitted that he
10 brushed against Ms. Wendt's hair and made the comment to her. Mr. Day reported the allegations
11 to his supervisor.

12
13 2.11 On May 25, 2000, C. Jan Gregg, Chief Executive Officer of ESH, requested that the DSHS
14 Division of Access and Equal Opportunity (DAEO) conduct an investigation of the allegations. Jeri
15 Van Dyk, Civil Rights Investigator, conducted the investigation. She completed her report on July
16 17, 2000. Ms. Van Dyk concluded that a preponderance of the evidence supported Ms. Wendt's
17 allegations that she was subjected to unwelcome and uninvited behaviors that occurred because of
18 her gender and that the conduct negatively altered her work environment. Ms. Van Dyk
19 recommended that ESH take immediate and appropriate corrective/disciplinary action.

20
21 2.12 Mr. Day received a copy of the report on July 26, 2000. He initiated a Conduct
22 Investigation Report (CIR) on July 31, 2000.

23
24 2.13 Subsequent to the May 23, 2000, incident, Harold Wilson, became the Chief Executive
25 Officer of ESH. He considered the investigative materials, including the DAEO report and
26 concluded that misconduct occurred. On August 18, 2000, he held a pre-termination hearing with

1 Appellant. After considering all of the information provided, including Appellant's response to the
2 charges, his employment history, and the serious nature of his misconduct, Mr. Wilson determined
3 that termination was appropriate.
4

5 2.14 Mr. Wilson concluded that Appellant's behavior was inappropriate and created a hostile
6 work environment for Ms. Wendt. Mr. Wilson determined that Appellant's actions violated agency
7 policies, that he neglected his duty to treat Ms. Wendt with dignity and respect, and that his actions
8 were blatant, overt, glaring, flagrant and intentional. Mr. Wilson felt that Appellant's termination
9 was more than justified.
10

11 2.15 DSHS Administrative Policy 6.02 states, in relevant part:

12 . . . All DSHS employees are responsible for creating and maintaining a work
13 environment free from sexual harassment and inappropriate behavior of a sexual
14 nature. . . .

15 Any employee who is found to be in violation of this policy may be subject to
16 corrective/disciplinary action, which could include dismissal. . . .

17 2.16 DSHS Administrative Policy 6.04 states, in relevant part:

18 The Department of Social and Health Services requires employees to perform duties
19 and responsibilities in a manner that maintains standards of behavior that promote
20 public trust, faith, and confidence. Specifically, employees shall:

21 (1) Strengthen public confidence in the integrity of state government by
22 demonstrating the highest standards of personal integrity, fairness, honesty, and
23 compliance with laws, rules, regulations and department policies.

24 (2) Create a work environment that is free from all forms of discrimination and
25 sexual/workplace harassment. This includes, but it not limited to:

26 a. Following and abiding by departmental policies regarding nondiscrimination,
sexual harassment, and client rights. . . .

b. Creating an environment free from intimidation, retaliation, hostility, or
unreasonable interference with an individual's work performance.

. . . .

1 (4) Interact with co-workers with respect, concern, courtesy, and responsiveness.

2
3 2.17 ESH Policy 1.41 states, in relevant part:

4 **II. SCOPE AND DEFINITION**

5 1. Workplace violence: Any physical assault, harassment, or placing another
6 person in substantial fear of such actions. This definition also encompasses any
7 action on the part of one person to create a hostile work environment for another
through the use of fear or intimidation.

8 2. Harassment: Words, gestures, or actions that alarm or abuse another person. .
9 . . Use of offensively coarse language, offensive touching or any other course of
alarming conduct which serves no legitimate purpose also constitutes harassment.

10 . . .
11 **III. POLICY**

12 A. ESH has adopted a zero-tolerance policy for any act of workplace violence as
defined above. . . .

13
14 C. Any person who . . . harasses, intimidates . . . someone at the workplace or
15 from the workplace, using any state resources such as work time, work place . . .
or other means, may be subject to corrective or disciplinary action, up to and
16 including dismissal. . . .

17 2.18 In addition to complying with agency policies, all security staff are expected to comply with
18 security department policies and directives. By memorandum dated January 17, 1997, security staff
19 was directed to "be acutely aware of how we are perceived by others." Security Department Policy
20 100 directs security staff to "present a professional image through their appearance, attitude,
21 demeanor and personal conduct." The Security Department Code of Ethics states that staff will
22 strive "to conduct [themselves] with honesty and to adhere to the highest moral principles. . .
23 [and] conduct [themselves] professionally at all times. . . ."

24
25 **III. ARGUMENTS OF THE PARTIES**

1 3.1 Respondent argues that Appellant embarrassed, intimidated, and scared Ms. Wendt when he
2 touched her in a very personal way. Respondent contends that Appellant's conduct represents
3 inappropriate behavior of a sexual nature, was demeaning and offensive, and constituted
4 harassment. Respondent argues that Appellant willfully violated agency and department policies,
5 that he neglected his duty to treat Ms. Wendt with dignity and respect, and that his conduct cannot
6 be tolerated. Respondent contends that in light of the serious and threatening nature of Appellant's
7 misconduct, dismissal is appropriate.

8
9 3.2 Appellant argues that dismissal is too severe. He admits that in hindsight, he made a
10 mistake and he should have handled the situation with Ms. Wendt differently. Appellant contends
11 that now that he knows Ms. Wendt was offended by his comment, he would never do it again.
12 Appellant contends that his comment was not intended to be sexual and that he was not making
13 sexual overtures toward Ms. Wendt. Appellant argues that he is an eleven-year employee with no
14 prior history of inappropriate behavior of a sexual nature, that he made an error in judgment on one
15 day of his career, and that in light of the totality of the circumstances and what actually happened
16 between he and Ms. Wendt, dismissal is too severe.

17 18 **IV. CONCLUSIONS OF LAW**

19 4.1 The Personnel Appeals Board has jurisdiction over the parties hereto and the subject matter
20 herein.

21
22 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting
23 the charges upon which the action was initiated by proving by a preponderance of the credible
24 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the
25 sanction was appropriate under the facts and circumstances. WAC 358-30-170; Baker v. Dep't of
26 Corrections, PAB No. D82-084 (1983).

1
2 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her
3 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't
4 of Social & Health Services, PAB No. D86-119 (1987).

5
6 4.4 Respondent has met its burden of proof that Appellant's behavior constituted a neglect of
7 his duty. Appellant had a duty to treat his co-workers with dignity and respect, and he failed to act
8 in a manner consistent with this duty when he touched Ms. Wendt's hair, pulled the neckline of her
9 blouse away from her body, and commented to her. Appellant's actions were inappropriate,
10 unwelcome, sexual in nature, and disrespectful. Appellant also neglected his duty when he failed to
11 abide by the agency's policies concerning sexual harassment and ethical conduct.

12
13 4.5 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to
14 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989).

15
16 4.6 Respondent has met its burden of proof that Appellant's behavior constituted gross
17 misconduct. Respondent has a responsibility to provide its employees with a work environment that
18 is free from harassment and intimidation and where employees are treated with respect and dignity.
19 Appellant's actions toward Ms. Wendt affected the agency's ability to provide such an
20 environment. Appellant's actions were sexual in nature and had the effect of creating an offensive
21 work environment.

22
23 4.7 Willful violation of published employing agency or institution or Personnel Resources
24 Board rules or regulations is established by facts showing the existence and publication of the rules
25
26

1 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the
2 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

3
4 4.8 Respondent has met its burden of proof that Appellant willfully violated agency policies.

5
6 4.9 Under the totality of the proven facts and circumstances presented here, Respondent has met
7 its burden of proving the charges in the disciplinary letter. In light of the serious nature of
8 Appellant's misconduct and given his history of repeated counseling, Respondent has established
9 that the disciplinary sanction of dismissal is appropriate. Therefore, the appeal should be denied.

10
11 **V. ORDER**

12 NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of David Bloshenko is denied.

13 DATED this _____ day of _____, 2002.

14 WASHINGTON STATE PERSONNEL APPEALS BOARD

15
16 _____
17 Walter T. Hubbard, Chair

18
19 _____
20 Gerald L. Morgen, Vice Chair

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24
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26
Personnel Appeals Board
2828 Capitol Boulevard
Olympia, Washington 98504
(360) 586-1481